IN THE

Supreme Court Of The United States

October Term, 1966

No. . . . . .

NATIONAL SURETY CORPORATION,
Petitioner

versus

THE UNITED STATES OF AMERICA for the use of
WAY PANAMA, S.A.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the District Court is reported in 238 F. Supp. 887 and is found in the printed record at pages 275-286. The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported to Appellant's knowledge, but copies are attached hereto (Appendix A, infra).

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1967. Petition for Rehearing was timely filed and was denied by the Court of Appeals on July 5, 1967. This Court has jurisdiction under 28 U.S.C.A. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that because of the alleged intermingling, Ulhorn International, S.A. was not a subcontractor of Ulhorn Construction Company?

2. Did the Court of Appeals err in holding that the alleged intermingling created a direct contractual relationship between Appellee, Way Panama, S.A., and the contractor furnishing the payment bond, Ulhorn Company?

3. Did the Court of Appeals err in holding that the alleged intermingling made Ulhorn Construction Company and Ulhorn International, S.A., the latter a corporation, one and the same legal entity?

4. Did the Court of Appeals err in holding that Appellee did not have to give notice as required by the Miller Act? Title 40 U.S.C.A., Section 270b.

5. Did the Court of Appeals err in disregarding the corporate entity of Ulhorn International, S.A.?

6. Did the Court of Appeals err in holding that Ulhorn International, S.A. and Ulhorn Construction Company were essentially the same entity?

7. Did the Court of Appeals err in holding that the evidence justified disregarding the corporate entity of Ulhorn International, S.A.?

STATUTES INVOLVED

"Miller Act" (in pertinent part):

40 U.S.C.A., Section 270a. **Bonds of contractors for public buildings or works . . .**

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building

or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person

Section 270b. **Same; rights of persons furnishing labor or material**

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of the period of ninety days after the day on which the last of the labor was done or performed by him or material furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: **Provided, however,** that any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of

the party to whom the material was furnished or supplied or for whom the labor was done or performed.

STATEMENT OF THE CASE

This is a Miller Act case, arising out of a contract performed in the Canal Zone for the construction of the International Flight Service Station — Artcc Building in Balboa, Canal Zone. (R 23, 26).

Petitioner, National Surety Corporation, was surety on the payment bond issued by Ulhorn Construction Company as principal and payable to the United States Government, same being Standard Bond Form 25A, conditioned that:

> "If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue." (R 19)

Respondent, Way Panama, S.A. delivered materials to a corporation called Ulhorn International, S.A.

No written notice was given by Respondent, Way Panama, S.A. to either William Baynes Ulhorn, d/b/a Ulhorn Construction Company, hereinafter called Construction, nor Ulhorn International, S.A., the corporation with whom it contracted, hereinafter called International, before the expiration of a period of ninety days after the day on which the last labor was done or material furnished as provided in the Miller Acts. (R 281)

REASONS FOR GRANTING WRIT

Summary

Certiorari should be granted because the Fifth Circuit's opinion herein is at variance with an opinion of the Supreme Court; because the Court of Appeals in this case has rendered a decision in conflict with the decisions of other Courts of Appeals on the same subject. The Writ should also be granted because the Appeals Court has decided important questions of federal law which have not been, but should be, settled by the Supreme Court. The Fifth Circuit Court of Appeal in this case has departed so far from the accepted and proper course of judicial procedure and has sanctioned such a departure by a lower court, as to urgently require an exercise of the Supreme Court's power of supervision.

The decision of the Court of Appeals in this case involves a standard Miller Act Payment Bond Form 25A, and therefore affects a multitude of construction contracts throughout the United States and could ultimately greatly increase the ultimate cost of construction to the federal government. The decision, as written, has effectively abolished, in a large number of situations, the limitations on the surety's liability plainly written into the Miller Act by Congress. In so doing, the Court of Appeals has clearly decided this case wrong, and created confusion and uncertainty in what should be a clear and certain area of law. The result is not only an injustice to the Petitioner, but will also have a profound and undesirable effect on federal construction wherever found.

CONTRACTUAL RELATIONSHIPS

Since Respondent admittedly gave no notice in this case, the issue clearly presented is whether it had a direct contractual relationship with a subcontractor but no contractual

relationship expressed or implied with the contractor "furnishing said payment bond". The Supreme Court has written on this language only once to petitioner's knowledge in **CLIFFORD F. MacEVOY CO. v U.S.**, 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163, The Supreme Court said:

> ". . . The proviso of Section 2(a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) **those materialmen,** laborers, and subcontractors who, **lacking express or implied contractual relationship with the prime contractor,** have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. **To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act . . .**" (Emphasis added)

Any doubt as to what Congress meant when it said that persons having no contractual relationship express or implied with the contractor furnishing said Payment Bond must give notice of their claim in order to be entitled to collect, has long since been resolved. Two District Court cases have directly considered the question Congress meant when it specified an "express or implied contractual relationship with the prime contractor" in the Miller Act. Both cases decided that such proviso requires an express contract or a contract implied in fact. **UNITED STATES v MARYLAND CASUALTY COMPANY** (S.D. Cal., 1946) 64 F. Supp. 522; **UNITED STATES for the use of BRUCE CO., INC. v FRASER CONTR. CO.** (W.D. Ark., 1949) 87 F. Supp. 1.

More recently the Ninth Circuit Court of Appeals in following the clear language of the statute, the Supreme

Court's language in the MacEvoy case, supra, as well as the Maryland Casualty Co. and Bruce cases solidified the ruling law in the subject to be that the contract, express or implied, required by the Miller Act must be a contract **based on mutual consent between the parties.** In **FIDELITY AND DEPOSIT COMPANY OF MARYLAND v HARRIS** (9 Cir., 1966) 360 F. 2d 402, the Court clearly held that the word contract as used in the Miller Act required a contract "based on assent inferred from all the facts of the circumstances". In the Harris case, Dixon, the contractor furnishing the Miller Act Bond, executed a prime contract with the California Institute of Technology, and then subcontracted the excavation work to Harris. Harris in turn relet his **entire** excavation subcontract to Yost for a lesser sum than Harris was to be paid (note that this was a total assignment of Harris' subcontract, rather than a partial assignment, as was present between Construction and International). Yost rented excavating equipment from Paramount. Disputes arose during the process of construction between Dixon, the contractor furnishing the bonds and Harris, his immediate subcontractor. As a result of these disputes at the end of the job and after with drawal of both Harris and Yost, the intervening subcontractors, Paramount rented certain pieces of equipment at the cost of about $400.00 directly to the prime contractor, Dixon. Paramount was not paid by either Yost or Dixon and filed proper notices within the required ninety day period. Dixon did not pay anyone, Harris, Yost, or Paramount for the work covered by Paramount's ninety day Miller Act notice. On trial, Paramount contended that it was entitled to recover the amount of the rentals incurred by Yost, as well as those incurred by Dixon from Dixon's Miller Act surety. The question presented on that appeal which are relevant to the issues in this case were:

(1) Was Paramount entitled to recover **all** of its claim from Dixon on a quasicontractual basis?

(2) Was Paramount entitled to recover anything from Dixon's surety for rentals incurred by Yost?

The Court, in a sound and well reasoned opinion, held that Paramount was entitled to recover from Dixon, the contractor, himself, since Paramount had conferred a benefit on Dixon, the full amount of its claim based on quantum meruit under the theory of unjust enrichment. However, the Court held that Paramount could **not** recover the amount of its claim incurred by Yost from the Miller Act surety because the required contractual relationship was not present between Paramount and Dixon as to that portion of the claim. The Court thus specifically held that in spite of Harris' total assignment of his subcontract to Yost, Harris remained in the chain of subcontractors and had to be considered in determining with whom Paramount was in contractual privity and how far removed he was from the contractor who furnished the payment bond. Distinguishing the liability of the surety founded on the statute and contract from the liability of Dixon based on equitable principals said:

> "Such liability (the liability of Dixon to the debt incurred by Yost) is not in reality contractual in character, but is imposed in the absence of any privity between the parties or circumstantial evidence of contractual assent to prevent unjust enrichment."

One other District Court case has also directly interpreted the language under consideration. **UNITED STATES for the use of TEICHERT & SON v ANCHOR CONTRACTORS, INC.** (N.D. Cal. 1966) 257 F. Supp. 474 was a case in

which Myers entered into a contract with the government and furnished the standard form 25A Miller Act Bond. Three days after the execution of the bond, Myers entered into a contract with Defendant Anchor Contractors, Inc. which the Court treated as having made Anchor and Myers either joint adventurers or partners for a single purpose. The Plaintiff in the Miller Act suit had contracted with Anchor Contractors, Inc. but gave no notice of its claim as required by the Miller Act of one having no "contractual relationship express or implied, with the contractor furnishing the payment bond." The Court noted that the Miller Act itself defines "contractor" for the purposes of the statute as the person for whom the bond is issued and then noted that the question presented was whether or not there was a contractual relationship with the "contractor furnishing the payment bond." The Court correctly held that since the claimant had no contractual relationship with Myers, the nature of the relationship of Anchor Contractors, Inc. with Myers was not relevant and therefore the Defendant was entitled to judgment since the claimant failed to give the notice.

The Court of Appeals in this case held that Ulhorn Construction Company, and Ulhorn International, S. A., the corporation, operated essentially as one entity and therefore, the Respondent did not need have a contractual relationship with a subcontractor and was not required to give notice. There is no law supporting such a proposition, and the Courts have **never** before held that a **person** and a **corporation** can be even by legal fiction the same entity. Such a unique and drastic innovation in the law requires the immediate attention of the Supreme Court to correct the grossest kind of error on the part of an intermediate court.

Regardless of the fact that it is impossible for Construc-

tion and International to be the same, Petitioner recognizes that in certain instances and for limited purposes, the separate corporate structure, created by statute, can be disregarded. The only case cited by the Appeals Court dealing with even a similar proposition involves a situation in which the Fifth Circuit allowed a corporate veil to be pierced. Although the basis of the court's decision in this case is not clear, giving the Court of Appeals the benefit of the doubt, it is assumed that it in effect held that the facts and circumstances that existed were sufficient to justify piercing of the corporate veil of Ulhorn International, S. A. and that Ulhorn Construction Company (the individual) was therefore liable for the debt of Ulhorn International, S.A. (the corporation). Even assuming that this was what the Court of Appeals was doing and what it meant, **its decision is clearly wrong.** Piercing a corporate veil to hold persons behind it responsible is clearly an equitable remedy to avoid injustice. It is a completely different legal theory from finding in law an actual mutual assent and consideration. This difference in legal theories was graphically illustrated by the Eighth Circuit in the case of **FARM SECURITY ADMINISTRATION'S DEPARTMENT OF AGRICULTURE** v **HERREN** (8th Cir., 1948) 165 F. 2d 554 was a Tucker Act suit on an alleged government contract since Plaintiff predicated its case on the theory that since the Farm Security Administration, as an agency of the government, took possession and managed the affairs of the Ashley Homestead Association, Inc., the Farm Security Administration was the real contracting party. The District Court in that case had disregarded the entity of the Ashley Homestead Association, Inc. but the Eighth Circuit reversed and held that the suit against the government was not authorized because a contract could not be created by merely disregarding one entity. In so holding the Court said:

> ". . . the fact that the Association was a duly and legally constituted separate corporate entity presents an insuperable obstacle to the imposition of liability on the United States. **Contrary to the theory of plaintiff's case, piercing the corporate veil of Ashley** to find it an instrumentality of the United States **does not support a finding of a contract, express or implied in fact,** with the United States. The principles governing the piercing of the corporate veil are broad equitable principles and it is not done by the courts in order to reach and impose liability upon someone who has agreed to pay either by actual promise or one implied in fact, but rather upon someone behind the contracting corporation who ought to pay but has avoided making any agreement to do so, express or implied in fact . . . The Court was required to recognize the separate existence of the Association as it was proven and such recognition does not tend to aid in the consummation of or sanction any fraud or wrong, but is in accord with the law." (Emphasis ours)

It is apparent from the foregoing that no matter how intermingled the affairs of Construction and International had been, no contract could thereby be created between Respondent and Construction, when Respondent's sole contract was with International. Even more glaring a wrong is apparent from the record here where **no evidence exists** which would in any event support piercing the corporate veil as far as construction itself is concerned. Even in a proper case statutory corporate entity it is essential to show three elements: (a) control, to the extent that the corporation had at the time no separate mind, will, or existence of its own, (b) abuse of the control to permit fraud or wrong, and (c) that abuse of the control proximately causing the injury complained of. **SIRMONS v ARNOLD LUMBER CO.** 167 So. 2d 588 (Fla., 1964); **ROUNDS & PORTER LUMBER CO. v**

BURNS, 216 Ark. 288, 225 S.W. 2d 1; **LOWENDAHL v BALTIMORE O.R. CO.**, 247 App Div. 144, 287 N.Y.S. 62, 76; **FISSER v INTERNATIONAL BANK** (2nd Civ. 1960) 282 F. 2d 231, **STEVEN v ROSCOE TURNER AERONAUTICAL CORPORATION** (7th Cir. 1963) 324 F. 2d 157. In this case it is apparent that not even one of these elements was proved so as to allow Respondent to reach behind the corporate veil to the alleged responsible part, if there was one. The record in this case does not ever record what connection, if any, W. B. Ulhorn had with Ulhorn International, S.A. Even if the facts had existed to allow that type of a piercing action, it would be manifestly unjust and a judicial abuse and misapplication of the equitable doctrine of piercing the corporate veil to reach behind the corporation and then out to the side of the person reached by such piercing to reach National Surety Corporation, an innocent third party.

The Court of Appeals has failed to apply applicable federal law to the questions presented in this case. It has also failed to follow the well-established rule of common law which requires that in order to have a contractual relationship, you must have mutual assent of all parties and that by piercing a corporate veil, you do not thereby create a contract between non-assenting parties. It is clear therefore, that the Court of Appeals' decision in this case is contrary to the Supreme Court's holding in MacEvoy, other intermediate court opinions, and the common law.

Petitioner thereupon prays that this Petition for Writ of Certiorari be granted and that the judgment of this circuit be reversed and for all costs of suit and for such other and further relief to which it may show itself justly entitled.

Respectfully submitted,
WILEY, THORNTON & PLUMB

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari was mailed to Fred Munch, Attorney for Respondent, 500 Jefferson Bldg. Suite 609, Houston, Texas 77002, on this the 28th day of September, 1967, persuant to Rule 33.

Dayton G. Wiley

APPENDIX A

IN THE

United States Court of Appeals

For The Fifth Circuit

No. 22645

NATIONAL SURETY CORPORATION,
Appellant,

versus

THE UNITED STATES OF AMERICA for the use of WAY PANAMA, S.A.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF THE CANAL ZONE

(May 31, 1967)

Before HUTCHESON, AINSWORTH and DYER, Circuit, Judges.

HUTCHESON, Circuit Judge: This appeal is from a judgment of the district court,[1] sitting without a jury, which allowed recovery by the use plaintiff Way Panama, S.A. (hereafter appellee) against National Surety Corporation (hereafter Surety) on a Miller Act[2] payment bond. Surety urges reversal on two grounds: (1) that appellee failed to give the statutory notice which purportedly was a condition precedent to recovery on the bond; and (2) that the suit is barred by the statute of limitations. We disagree with both contentions, and affirm the judgment.

1 238 F. Supp. 887 (D.C.Z. 1965).
2 49 Stat. 793 (1935), 40 U.S.C. 270a et seq.

William B. Uhlhorn, doing business as Uhlhorn Construction Company (hereafter Construction), entered into a contract with the Federal Aviation Agency (FAA) for the construction of a public building. In connection with that contract, Construction, as the prime contractor, caused Surety to issue a payment bond in behalf of all persons supplying labor and material to the project. In the performance of the contract, Construction employed the personnel and equipment of Uhlhorn International, S.A. (hereafter International), a corporation also controlled by Uhlhorn the individual. Appellee thereafter agreed to supply labor and materials to International for the consideration of approximately $178,000. Appellee performed its part of the agreement but received only partial payment from International; it brought suit against International and Surety for the balance. It was admitted that $23,000 was due and owing from International to appellee and an agreed judgment was entered against International alone for that amount. The only question is whether Surety may be held liable under the bond it issued to Construction for the amount owed by International to appellee.

Surety's first defense is that appellee cannot recover on the bond because it failed to give notice of its claim to the prime contractor, Construction, in accordance with the notice provision of the Miller Act, 40 U.S.C. Sec. 270b(a) which provides in pertinent part:

> "That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last labor or furnished or supplied the last of the material for which such claim is made."

The application and significance of this provision depend on International's relationship to Construction. For if, as Surety contends, appellee was dealing with a subcontractor when it dealt with International, then appellee would have been required to give the 90-day written notice of its claim to Construction, which appellee admittedly did not do. Appellee, on the other hand, argues that the notice provision does not apply under the circumstances of this case. This argument is grounded on the proposition that Construction and International did not stand in the relationship of prime contractor-subcontractor; rather, appellee asserts that the operations of Construction and International were so intermingled by Uhlhorn that they both must be viewed as one and the same business concern with whom appellee had dealt directly. The district court agreed, finding as a fact that "Uhlhorn Construction Company employed personnel, equipment, material, funds and the corporate entity of defendant Uhlhorn International, S.A., a corporation controlled by William Baynes Uhlhorn, **indiscriminately** with those of Uhlhorn Construction Company . . . ." 238 F. Supp. 890 (emphasis added). The court said it refused "to permit the prime contractor to escape his obligations and thus relieve his surety by the use of a corporation set up by him and used inextricably by him in the prosecution of the contract . . . ." 238 F. Supp. 892.

After careful review of the record, we are convinced there is ample evidence to support the findings and the judgment of the district court. There are several reasons why International should be considered the same entity as Construction and thus a prime contractor, rather than a subcontractor, with regard to the application of the notice provision. First of all, Uhlhorn himself caused Construction to assign the FAA contract to International; this assign-

ment, although made without the knowledge or consent of Surety, squarely placed International in the position of prime contractor. Furthermore, some applications for permits to import equipment or materials without duty purported that International was the general contractor. Moreover, various contracts with subcontractors executed by Uhlhorn refer to International as the "general contractor." Finally, stationery of both Construction and International was used interchangeably to make purchase orders with the name of one company blotted out and the name of the other substituted.

It is quite clear to us that William B. Uhlhorn operated in the form of Construction or International whenever it suited him. We conclude that with respect to the performance of the FAA contract the two concerns were operated essentially as one entity, namely, the prime contractor. See **Markow v. Alcock**, 356 F.2d 194, 197-198 (5th Cir. 1966); **United States for the use of Korosh v. Otis Williams & Co.**, 30 F. Supp. 590, 593 (D.Idaho 1939). Compare **United States for the use of Teichert & Son, Inc. v. Anchor Contractors, Inc.**, 257 F. Supp. 474 (N.D. Cal. 1966); **United States for the use of Westinghouse Elec. Supply Co.**, 125 F. Supp. 25 (D.Mass. 1954). Since appellee therefore did not have a contractual relationship with a subcontractor, the Sec. 270b(a) notice provision did not govern, and it was not necessary for appellee to give Construction the 90-day notice in order to recover on the bond from Surety.

With regard to the limitations defense, 40 U.S.C. Sec. 270b(b) provides that no suit hereunder "shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him." Appellee filed its original complaint

against International on June 14, 1963, which was within a year from the date on which the last material was delivered and labor performed on June 15, 1962. However, Construction was not named in the original complaint. Not until appellee filed an amended complaint on July 30, 1964, was it alleged that International and Construction had been operated as a single entity. Surety insists that the statute of limitations had run on any complaint against Construction. Our conclusion that the two concerns must indeed be considered as a single operation forecloses this contention which is premised on the existence of two separate businesses operated as such.

The judgment was right. It is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 22645

NATIONAL SURETY CORPORATION,
Appellant

VS.

UNITED STATES OF AMERICA, for the use of WAY PANAMA, S. A.,
Appellee

Appeal from the United States District Court
for the District of the Canal Zone

(July 5, , 1967)

On Petition for Rehearing

Before HUTCHESON, AINSWORTH and DYER, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

U. S. Court of Appeals
FILED
July 5, 1967
EDWARD W. WADSWORTH,
CLERK